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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ISMAEL ALEJANDRO
SEPULVEDA,

Defendant and Appellant.

B289564

Los Angeles County
Super. Ct. No. KA114391

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed and remanded with directions.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Ismael Alejandro Sepulveda of four counts of second-degree robbery (Pen. Code, § 211), one count of carjacking (Pen. Code, § 215, subd. (a)), one count of recklessly fleeing a peace officer's motor vehicle (Veh. Code, § 2800.2), one count of grand theft of an automobile (Pen. Code, § 487, subd. (d)(1)), and one count of hit and run driving resulting in property damage (Veh. Code, § 20002, subd. (a)).

On appeal, Sepulveda argues: (1) the trial court should have stricken all but one of his prior convictions under the "Three Strikes" law; (2) his sentence of three years and eight months, plus 152 years to life, is cruel and unusual; (3) the case should be remanded in light of Senate Bill No. 1393 (2017–2018 Reg. Sess.) (SB 1393); and (4) the trial court should award him 72 days of presentence conduct credit under Penal Code section 2933.1. We remand for resentencing under SB 1393 and award Sepulveda presentence conduct credits. We otherwise affirm.

I

We summarize facts in favor of the prevailing party at trial.

January 18, 2017. 6:50 a.m. Ravinder Singh was the 7-Eleven cashier on duty. Sepulveda walked to the counter with a scarf around his face. Singh asked Sepulveda to lower the scarf from his face three times, but Sepulveda refused. Sepulveda pulled a gun from his waistband and ordered Singh to open the register and hand over the money. The gun was about two feet long. Singh was afraid and obeyed.

January 18, 2017. 7:07 a.m. Minutes later, Sepulveda entered another 7-Eleven store. Pamela Rangel was the cashier. Sepulveda had a scarf covering half his face. He carried several items to the counter. He asked Rangel for a pack of cigarettes and paid for the cigarettes and other items. Rangel shut the

register after giving Sepulveda his change. She saw Sepulveda's gun aimed at her. Sepulveda ordered Rangel to open the register and give him everything in it. Rangel took the till out of the register, placed it on the counter, and stepped away. She was scared for her life.

January 19, 2017. 7:00 p.m. Frankie Beverly worked at FedEx. He drove his silver Mazda 3 to work and stored his keys in an unlocked employee locker. There were no security guards in the area. When Beverly returned from his shift, his car keys and car were gone. A surveillance video showed Sepulveda reaching into the locker where Beverly placed his keys. Beverly's car was worth about \$5,000.

January 21, 2017. 4:14 a.m. Gregory Sanchez worked the graveyard shift at a different 7-Eleven store. Sepulveda walked in carrying a cardboard box that had been discarded outside the store. Sepulveda had black markings all over his face and "looked like a maniac." The markings looked like they were made with magic marker. Sepulveda asked Sanchez for cigarettes. Sanchez saw what appeared to be a small caliber handgun in Sepulveda's hand. Sepulveda said, "This is happening" and told Sanchez to hand over the money. Sanchez was scared and gave Sepulveda the money in the cash register.

January 21, 2017. 4:24 a.m. Juan Sartiaguin was the cashier on duty at Chevron. Sepulveda parked a silver Mazda 3—Frankie Beverly's car—and walked into the gas station store with a cardboard box. Sepulveda had tattoos on his left fingers in shapes "like the ones from the deck of cards." He also had a black mark on his cheek, but Sartiaguin could not tell if it was tattooed or made with a marker. Sepulveda pulled a gun out of the box and asked for the money in the cash register. Sartiaguin took out

the money and put it on the counter. Sepulveda told Sartiaguin to put the money in the box instead. Sartiaguin feared for his life and obeyed.

Sartiaguin called the police after Sepulveda left. Police Officer Joseph Castillo responded to Sartiaguin's call and watched the surveillance video.

January 22, 2017. 3:11 a.m. Early the next morning, Officer Castillo saw the silver Mazda from the Chevron surveillance video. The car was parked and facing south in the northbound lane of traffic. The front of the car had collision damage. The car had hit a parked vehicle in front of it. The right front passenger door was open. Nobody was in the car. Castillo searched the car and found a .22 caliber Ruger rifle on the floorboard and .22 caliber bullets in a blue coin purse.

Police investigation confirmed Sepulveda's fingerprints were on the car. The rifle found in the car was the weapon Sepulveda used to rob the three 7-Eleven stores and the Chevron station.

January 23, 2017. 12:00 p.m.–1:00 p.m. Lauren Deane got gas from a Chevron station. Then she went into the Chevron convenience store to get money from the ATM. Deane returned to the gas pump and was getting into her black Nissan Altima when Sepulveda and a woman approached her from behind. Sepulveda wore a hood on his head and a scarf around the lower part of his face. Sepulveda said he had a gun and ordered Deane to "Gimme the keys." Deane saw the shape of a gun under Sepulveda's jacket. Fearing for her life, Deane gave Sepulveda the keys and ran back into the convenience store. Sepulveda got into the driver's seat and drove away. Deane's car was worth about \$15,000.

January 24, 2017. A surveillance team called Police Detectives Freeman and Berger to arrest a robbery suspect. The detectives had a description of Sepulveda and the car he was driving. They saw Sepulveda in a black Nissan Altima, turned on sirens and lights, and followed him. Sepulveda immediately accelerated and drove through stop signs and red lights, nearly hitting pedestrians and oncoming traffic. Sepulveda lost control of the car and hit another car. He got out and ran across the street into a trailer park. Other officers chased and arrested him.

II

The procedural posture of this case is that Sepulveda lost at trial on eight counts and now appeals.

As noted at the outset, the jury convicted Sepulveda of eight counts. The jury also concluded Sepulveda was armed with a firearm (Pen. Code, § 12022, subd. (a)(1)) and personally used a firearm (Pen. Code, § 12022.53, subd. (b)) in the robberies, but not in the carjacking.

Sepulveda's four robbery convictions and one carjacking conviction were violent and serious strike felonies. (Pen. Code, §§ 667.5, subds. (c)(9) and (17), 1192.7, subds. (c)(19) and (27).) At sentencing, the trial court found allegations about Sepulveda's eight prior robbery convictions to be true beyond a reasonable doubt. These convictions were prior strikes under the Three Strikes law (Pen. Code, §§ 667, subd. (d), 1170.12, subd. (b)). The court denied Sepulveda's motion to strike his prior convictions. The court sentenced Sepulveda to three years and eight months, plus 152 years to life.

III

Sepulveda challenges his sentence, but his two sentencing arguments lack merit.

A

The trial court did not abuse its discretion by denying Sepulveda's request to strike his prior convictions under the Three Strikes law. (Pen. Code §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d), 1385, subd. (a).)

Sepulveda argues the trial court should have stricken all but one of his prior convictions because a second-strike sentence would have punished him sufficiently. That is irrelevant. The relevant question is whether Sepulveda was outside the Three Strikes law's spirit and therefore should be treated as though he was not previously convicted of serious or violent felonies. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court properly considered Sepulveda's current and prior convictions, background, character, and prospects. (*People v. Williams, supra*, 17 Cal.4th at p. 161.) Sepulveda had eight prior serious and violent strike felonies—all robbery convictions. In this case, four convictions were for robberies and one was for a carjacking. Sepulveda's repeat offenses—totaling 12 robbery convictions and one carjacking conviction—place him squarely within the spirit of the Three Strikes law.

At sentencing, Sepulveda implied drug use caused his prior criminal acts. The trial court found no evidence Sepulveda sought treatment in custody or after he got out. The court noted Sepulveda was on parole while he committed the robberies and carjacking in this case, and that Sepulveda used weapons in both cases. Nothing here put Sepulveda outside the spirit of the Three Strikes law.

Sepulveda argues his prior convictions should be stricken because he did not physically harm his victims. Applying the

Three Strikes law does not require physical injury. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) Its primary purpose is to protect society by deterring repeat felony offenders. (See *Ewing v. California* (2003) 538 U.S. 11, 26–27.) Sepulveda concedes he is “a repeat offender with a history of robbing.” He used a weapon in his past robberies. In this case, he threatened four victims with a gun. It was reasonable not to strike his prior convictions.

A repeat criminal falls outside the spirit of the Three Strikes law only in extraordinary circumstances. (*People v. Carmony* (2004) 33 Cal.5th 367, 378.) The trial court’s decision was not so irrational or arbitrary that no reasonable person could possibly agree. (*Id.* at p. 377.) The court reasonably concluded a self-described repeat offender with 12 robbery convictions was within the spirit of the Three Strikes law. We find no abuse of discretion.

B

Sepulveda cannot prevail by claiming his sentence is cruel and unusual punishment.

Sepulveda forfeited this claim, which requires a fact specific inquiry and cannot be raised for the first time on appeal. (*People v. Baker* (2018) 20 Cal.App.5th 711, 720.) Sepulveda forfeited the issue because he did not properly raise it in trial court.

In the trial court, Sepulveda’s indirect reference to the Eighth Amendment was too peripheral to avoid forfeiture. In his motion to strike prior convictions, Sepulveda included a quotation from *People v. Williams, supra*, 17 Cal.4th at page 160, summarizing factors the *Williams* court considered to determine whether the trial court abused its discretion by dismissing a prior

strike. One factor was the constitutional guarantees against disproportionate punishment. But, as Sepulveda concedes, this lone mention of the Eighth Amendment was “within the context of a discussion of *People v. Williams*.” That discussion was about striking prior convictions, not sentencing. At no point did Sepulveda object to his own sentence as cruel and unusual. This claim requires a fact specific inquiry. Sepulveda discussed no facts and thereby forfeited the claim.

Sepulveda claims his trial lawyer, by failing to object to the sentence as cruel and thereby forfeiting the issue, was ineffective. Sepulveda states: “Had trial counsel objected, the court would have deemed the sentence cruel and unusual.” This is incorrect. It is not ineffective to fail to attempt what is futile.

IV

There is need for a remand.

Sepulveda requests a remand in light of SB 1393. SB 1393 amended Penal Code sections 667 and 1385 to provide trial courts discretion to strike five-year sentencing enhancements based on prior serious felony convictions under section 667(a)(1).

Sepulveda asks we allow the trial court to determine whether to dismiss his five-year enhancements on counts one, three, four, five, and six. SB 1393 applies to Sepulveda retroactively. (See *In re Estrada* (1965) 63 Cal.2d 740, 744–745.)

We also direct the trial court to award Sepulveda 72 days of presentence conduct credit under Penal Code section 2933.1.

In sum, the case must be remanded for the trial court to exercise discretion as to the felony enhancements and to award Sepulveda 72 days of presentence conduct credit under Penal Code section 2933.1.

DISPOSITION

The matter is remanded to the trial court for resentencing. On remand, the trial court shall exercise its discretion to strike or dismiss the prior felony enhancements as authorized by SB 1393.

We direct the trial court to award Sepulveda 72 days of presentence conduct credit under Penal Code section 2933.1.

The judgment is affirmed in all other respects.

WILEY, J.

We concur:

BIGELOW, P. J.

STRATTON, J.